82-1114

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No. _____

In The

Supreme Court of the United States

October Term, 1982

George Rose, as next friend of Marla Rose,

Appellants,

vs.

State of Nebraska, Charles Thone, Governor of The State of Nebraska, Board of Education, School District No. 1, Douglas County, Nebraska, Owen Knutzen, Individually, and as Superintendent of School District No. 1, Douglas County, Nebraska, Dale Samuelsen, Individually, and as Assistant Superintendent in Charge of Special Education, of School District No. 1, Douglas County, Nebraska, Anne Campbell, Commissioner of Education for the State of Nebraska, State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education, Margaret Lockwood, Individually, and as a Member of the State Board of Education, Frank E. Landis, In-

(Continued on back of cover)

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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dividually, and as a Member of the State Board of Education, Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education, Arlene E. Hart, Individually, and as a Member of the State Board of Education, William C. Ramsey, Individually, and as a Member of the State Board of Education, Dorothy Beaver, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, June Bostwick, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Walter Calinger, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Pat Geringer, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Leo Hoffman, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Ruth Thomas, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Frank Bogard, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, James A. Monaghan, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, James Beutel, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Leo Kastrick, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska,

Appellees.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a private right of action for damages, actionable under either 42-USC § 1983 or 29-USC § 794, exists as a result of the violation of the statutory rights granted to handicapped children or their parents by 20-USC 1401 et seq.

2. Whether a plaintiff claiming damages for the violation of statutory rights granted by 20-USC 1401 et seq. must prove the existence of "exceptional circumstances" in connection with the alleged violations before damages will be awarded.

3. Whether a claim for damages, based upon an allegation of violation of the plaintiff's constitutional rights as granted by the 5th and 14th amendments, survives a finding of mootness.

4. Whether Federal Courts reviewing cases brought pursuant to 20-USC § 1415 are required to have prepared and consider the record of the proceedings which constitute the subject matter of the action.

5. Whether the Court of Appeals for the Eighth Circuit erred when, after declaring that damages were recoverable under 20-USC § 1415 in "exceptional circumstances", they then dismissed the damage claim determining that no "exceptional circumstances" existed without ever having read the record of the proceedings or, in fact, without a record ever having been prepared in the District or Appellate Court, even though commanded by the Act 20-USC § 1415, and specifically requested by the petitioner and without allowing the petitioner the opportunity to

present evidence to prove the existence of the "exceptional circumstance".

6. Whether the Court of Appeals applied an erroneous standard in the dismissal of the petitioner's claims for damage under 29 U. S. C. § 794 and 42 U. S. C. § 1983, and whether discrimination must be proved before a claim under 29 U. S. C. § 794 can prevail.

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Appellees.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

REFERENCE OF REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

1. United States District Court for the District of Nebraska.

    a. Memorandum filed May 16, 1980 granting Preliminary Injunction (Denney, J.).

    b. Memorandum and Order filed October 9, 1981 dismissing Petitioner's Complaint without prejudice (Robinson, J.).

2. United States Court of Appeals for the Eighth Circuit.

a. Opinion filed April 1, 1981 affirming, in part, the Order of the District Court dated May 16, 1980 and remanding for further proceedings.

b. Opinion filed August 30, 1982 affirming, in part, vacating in part, the Order of the District Court dated October 9, 1981 and remanding for determination of attorney fees.

c. Order dated October 1, 1982 denying Petitioner's Motion for Rehearing.

JURISDICTIONAL STATEMENT

1. The petitioner seeks review of the Judgment of the Court of Appeals for the Eighth Circuit, affirming the Judgment of the Federal District Court for the District of Nebraska, Robinson J., dismissing the petitioners' complaint. The Order of the Court of Appeals for the Eighth Circuit was entered on August 30, 1982.

2. The petitioner filed a motion for rehearing on the 7th day of September, 1982, which was overruled by the Court of Appeals for the Eighth Circuit on the 1st day of October, 1982.

3. Jurisdiction is confirmed upon this Court pursuant to 28-USC-1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following Constitutional provisions, statutes and regulations.

United States Constitution

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution

Amendment 14
Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U. S. C. § 794

No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS § 706 (7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees. (Sept. 26, 1973, P. L. 93-112, Title V, § 504, 87 Stat. 394; Nov. 6, 1978, P. L. 95-602, Title I, §§ 119, 122 (d) (2), 92 Stat. 2982, 2987.)

45 C. F. R. 84.35 and 84.36

§ 84.35 Evaluation and placement

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular

or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the students aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such

sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) Reevaluation of recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instructio· or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Terri-

tory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

20 U. S. C. § 1401, et seq.
and companion Federal Regulations

20 U. S. C. § 1415

(a) Establishment and maintenance. Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing. (1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who

shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency. If the hearing required in paragraph (2) of sub-

section (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings. Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12) [20 USCS § 1413(a)(12)]).

(e) Civil action; jurisdiction. (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party

aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part B, § 615, as added Nov. 29, 1975, P. L. 94-142, § 5(a), 89 Stat. 788.)

45 C. F. R. 121a.512

§ 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

Federal Rules of Civil Procedure

Rule 8(a)

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

BASIS OF INITIAL JURISDICTION

This action originated in the Federal District Court for the District of Nebraska pursuant to 20-USC 1415 as an appeal of a decision rendered as the result of a "Due Process" hearing conducted by a State Educational Agency.

20-USC 1415 allows appeal of such decisions to Federal District Courts, without consideration of the amount in controversy.

STATEMENT OF THE CASE

The Petitioner, Marla Rose, is a multihandicapped person being deaf, mute and partially aphasic.

The Petitioner, George Rose, is the natural father of Marla Rose.

This action was commenced in the Federal District Court for the District of Nebraska by Mr. Rose on behalf of Marla and himself, pursuant to 20-USC § 1415 to appeal a decision of a hearing officer made at the conclusion of a "Due Process" hearing conducted by the State of Nebraska pursuant to 20-USC § 1415.

The decision appealed from determined that Marla Rose should be transferred from the regular classrooms of Omaha, Nebraska Public Schools, where she had been enrolled all of her educational life, to the Nebraska School for the Deaf as a resident student.

The complaint alleged that the Nebraska "Due Process" hearing procedure conducted pursuant to 20-USC § 1415

was flawed because of the involvement of the State Commissioner of Education in the rendering of the final decision based upon the findings and recommendations of the hearing officer and thus insinuating an impermissible State officer in the hearing process.

The complaint prayed that this procedure be promptly restrained and enjoined.

The complaint also alleged that the various named defendants had violated the civil rights of Marla and her father, as granted by the 5th and 14th Amendments to the United States Constitution and by the Federal Statutes 20-USC 1401 et seq. and 29-USC § 794; in various particulars including (as illustration, not limitation) (1) the failure to formulate a proper individualized educational plan (I.E.P.) for Marla; (2) educating Marla without having a proper diagnosis or evaluation of her handicap; (3) for making a determination regarding Marla's education and placement without first having prepared a proper individualized educational plan (I.E.P.) for her; (4) by conducting a "Due Process" hearing for Marla and her parents which was not impartial as required by 20-USC § 1415; (5) by denying Marla a free, appropriate education; (6) by failure to allow Marla to remain in her "then current educational placement" pending conclusion of the "Due Process" hearing procedures; (7) by making a decision regarding Marla's education placement which, if carried out, would deprive Marla of the liberty and equal protection of the Federal laws accorded to other handicapped and non-handicapped children educated in the State of Nebraska and the Omaha Public Schools; (8) that their violations of the Federal Constitution and Statutory laws create a cause action against the defendants for damages actionable

under 42-USC § 1983; (9) that the laws of the State of Nebraska regulating "Due Process" hearings for handicapped children violated the Federal laws regulating the same process, which the State of Nebraska was obligated to obey as the recipient of Federal funds issued in support of 20-USC § 1401; and (10) that the Laws of the State of Nebraska denied Marla and her parents the "Due Process" of law.

The complaint then prayed for a declaration that Marla had been denied her Constitutional and Statutory rights; the right to present further evidence; various forms of restraining and injunctive relief; re-imbursement of the costs and attorney fees spent by Mr. Rose in the prosecution of this action and for damages incurred by Marla for her improper evaluation and placement and violation of her civil rights.

Because of the requests for restrain and injunction of the State Commissioner of Education, the Federal District Court ordered a hearing and limited testimony to the questions involving the restraint and injunction of the State officer.

Injunction was eventually ordered and the case and evidence from that time until dismissal never proceeded beyond that adduced at the "Due Process" hearing, of which Marla complained, and that offered on the issue of injunctive relief.

The defendants appealed the injunction to the Court of Appeals for the Eighth Circuit.

The Court of Appeals sustained the Order of the District Court in the granting of the injunction with slight

modification of the non-injunctive relief by eliminating the requirement that Marla be given a new "Due Process" hearing. The case was then remanded to the District Court for further proceedings.

After remand, Judge Denney, the presiding Judge in the Federal District Court, died.

At the request of the petitioner, the matter was reassigned to Judge Robinson of the Federal District Court for the District of Nebraska.

Pending rehearing, Marla married and moved outside the boundaries of the Omaha Public Schools but remained within the boundaries of the State of Nebraska.

The Defendants then filed in the District Court, a motion to dismiss the action alleging it had become moot as to Marla.

The District Court, Robinson J., found the matter was moot as to Marla and dismissed the action without prejudice.

The Petitioners then appealed this decision to the Court of Appeals for the Eighth Circuit which affirmed the dismissal of Marla's action as moot regarding the issues of her continued education but found that the issues of damages and attorneys' fees survived the mooting of the action and then determined that damages were not available to Marla because no "exceptional circumstances" existed which would merit their accord under 20-USC 1401 et seq. and further found that because Marla prevailed on

the issue of the injunction that she should be awarded attorneys' fees and remanded the action to the District Court for a determination of attorneys' fees.

The Petitioner then filed the petition for Writ of Certiorari.

ARGUMENT

The petitioner believes the Writ of Certiorari should be issued in this case for the following reasons, or any of them:

1. The claims of Marla for damages resulting from the violations of her Federal Constitutional and Statutory rights survive a finding of Mootness.
2. The question regarding whether a violation of the rights granted handicapped children and their parents by 20-USC 1401 et seq. or 29-USC § 794 will support a private right of action for damages actionable under 42-USC § 1983 is an important Federal question.

   This issue has received varying degrees of treatment from the various Courts of Appeal and is the proper subject for settlement by the decision of this Court.
3. The Court of Appeals erred in affirming the dismissal of the petitioner's complaint thus denying her the opportunity to prove violations of her constitutional and statutory rights.

42-USC § 1983 Question

The question of whether a violation of 20-USC 1401 et seq. is actionable under 42-USC § 1983 has been decided

as actionable under "exceptional circumstances" (*Miener v. State of Missouri*, 673 F. 2d 969 [1982, 8th Cir.]), and as not actionable *Anderson v. Thompson*, 658 F. 2d 1205 [7th Cir. 1981].

The Petitioner urges the application of the principle announced in *Maine v. Thiboutot*, 448 U. S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) to this issue.

20-USC § 1401 et seq. clearly through the provision for a free appropriate education of handicapped persons through age 21 and the incorporated procedures creating due process standards for the conduct of placement decisions and hearings, creates rights within the meaning of 1983.

The remaining issue of whether Congress has foreclosed a 1983 remedy by creating comprehensive remedial devices in the act should be resolved in favor of the 1983 remedy. Nothing points it out more clearly than this case where the recalcitrant School performs a reenactment of the Valentines Day Massacre on the petitioners' 20-USC 1401 rights and the education it was supposed to secure and then uses its wealth and every possible delaying tactic until the petitioner's age or circumstances no longer obligate the defendant to provide services and VOILA!, past violation of the petitioner's rights is both exonerated and rewarded.

As one example, consider the high degree of mobility of our nation's populace. It is quite likely that many handicapped children are at some time required, through the circumstances of their parents, to move from one school district to another. What good are "remedial devices" to these students after the fact, after they have been mis-

evaluated, misplaced and miseducated for years? The remedial devices no longer reach the past school district and the new school district surely could not be held accountable for the results of past violations.

America's School Districts have not rushed to meet handicapped children with open arms—only when the government held a loaded wallet to their head did they then, reluctantly, assume the task of educating the handicapped child.

Clearly, the lesson is—only money moves them—if it took money to get them to give handicapped children an education, then money—the loss of it—is the only thing that will keep them from denying the handicapped the education they need. "Remedial devices" are a joke. They are the smoke behind which a non-complying school district hides while avoiding the responsibilities they have been bribed to accept. To say that they provide an adequate substitute for the remedy of damages as a compeller of action with respect to the education of the handicapped indicates a lack of understanding of the nature of the difficulty.

In any event, the petitioner contends that the "devices" contained in 20-USC 1401 et seq. are (1) not remedial in nature and (2) not sufficiently comprehensive to foreclose, or indicate an intent on the part of Congress to foreclose, resort to 1983 as a remedy for violations of that act.

The Court of Appeals denominated the petitioner's references to a 1983 Cause of Action as "cryptic" and as "another means of making the same procedural arguments" (page 9 of opinion 8-30-82).

The petitioner urges that paragraphs 15, 18 and 20 of her complaint set out substantive violations of the act, as opposed to alleged procedural defects in the Nebraska Statutes, and that paragraphs 5, 19 and 20 of the complaint are sufficient, when read with the entire complaint, to put the defendants on notice of a claim for damages based upon 1983.

With respect to the allegation by the Court of Appeals that 1983 was included as another means of making the same argument, the petitioner asserts that the same set of facts may well give rise to more than one cause of action under more than one statute and that the petitioner's claims of violations of their Constitutional rights, the procedural inconsistency between State and Federal laws and the issue of the substantive violations of 20-USC 1401 et seq. may all be actionable under 1983 and that based upon the intent of 42-USC § 1983 as set forth in *Maine v. Thiboutot* (Id.) and the policy of restricting the violation of constitutional and statutory rights through assessment of damages points most strongly to the finding of a private cause of action for damages for violation of rights granted by 20-USC 1401 et seq.

29-USC § 794 Question

As to the petitioners' claims for damages based on violations of 29-USC § 794, here again the substantative violations in the form of incorrect evaluations and faulty individualized educational plans resulted in the exclusion of Marla from participation in the programs which were necessary and proper for her and also denied her the benefits of the program created under 20-USC 1401 et seq. for

which the defendants were receiving Federal assistance and are, as such, actionable as violations of 29-USC § 794.

The opinion of the Court of Appeals while stating that a private cause of action exists under 29-USC § 794 implies that a violation of 20-USC 1401 et seq. could not possibly give rise to a Cause of Action for violation of 29-USC § 794 and that no such violation can be made unless "discrimination" can be proven (pages 10, 11, 12 of 8-30-82 opinion). However, this Court's determination in *Board of Education v. Rowley*, 102 S. Ct. 3034 as to the necessity and importance of the preparation and use of a proper I.E.P., an issue of which the petitioner complained, would indicate to the contrary.

The petitioner believes both implications to be in error in that the statute prohibits exclusion from participation, denial of benefits OR discrimination and that such finding is in conflict with the holding on the identical issue by other Courts of Appeals recognizing a private cause of action under 29-USC § 794 and amounts to a decision of an important question of Federal law which should be decided by this Court.

Review of the Record Question

The Court of Appeals declared that a private action for damages for violation of 20-USC 1401 et seq. may be maintained in exceptional circumstances and then determined that no such exceptional circumstances were present in this action (page 8 of 8-30-82 opinion), and then dismissed petitioner's complaint without allowing the petitioner the opportuinty to prove the existence of any exceptional circumstances.

The petitioner believes this was error. No record of the administrative hearing, which is the subject of this action, has ever been produced or received by any Court, District or Appellate, even though 20-USC § 1415 commands that the Court review the record and even though the petitioner specifically requested its production and consideration. *Board of Education v. Rowley,* 102 S. Ct. 3034-3051 (1982).

The hearing complained of, lasted in actual hearing time eight (8) days and was drawn out over a period of approximately 210 days. Far in excess of the maximum 45 day limit established by 20-USC § 1415, 45 C. F. R. 121a.512.

The petitioner alleges it was error to find that no exceptional circumstances existed when the record of the proceedings had never been received and to dismiss the petitioner's complaint without allowing the petitioner the opportunity to prove the existence of circumstances regarding damaging acts which could be found to be exceptional.

Additionally, the petitioners allege that the giving of Marla Rose passing grades by Omaha Public Schools in every 9th grade subject in which she was enrolled (see appendix) a mere nine months after the Representative of the School District had testified that she was unable to pass 3rd grade subjects poses such a glaring inconsistency as to raise substantial questions regarding the existence of both gross misjudgment and bad faith (which the Court of Appeals considered essential to a cause of action under 29-USC § 794), in addition to the existence of exceptional circumstances.

Survival of Claims of Violations of Constitutional Rights Question

The Court of Appeals dismissed the petitioner's 42-U. S. C. 1983 claim for damages apparently on the premise that 20-U. S. C. 1401 et seq. does not create a private cause of action for damages. However, the petitioner suggests that her allegations that the various acts of the defendants resulted in the violation of her constitutional rights of Due Process and Equal Protection would if proven give rise to a cause of action for damages under 42-U. S. C. 1983 and that as an issue of damages, the claim survives a finding of mootness on other issues and should have been remanded to the District Court for Hearing. Accordingly the petitioner believes the Court of Appeals erred in the dismissal of the petitioner's 42-U. S. C. 1983 claim for damages.

Application of Erroneous Standard Question

The Court of Appeals, in essence dismissed the petitioners claim for damages based on an apparent finding that the complaint failed to sufficiently identify the precise acts claimed to be violations of 29-U. S. C. § 794 and for failure to identify precisely the basis for resort to 42-U. S. C. § 1983. (page 9, 8-30-82 Opinion).

The Petitioner claims this amounts to a reversal of a previous order by the District Court refusing to dismiss the complaint when challenged by the defendants on an identical basis; and that, if so, the matter should have been remanded and the petitioner allowed opportunity to amend.

The Petitioner also alleges that the pleadings did, in fact, set out specific violations by the defendants and

that, in any event, the pleadings were sufficient to put the defendants on notice as to the basis of the petitioners' claims to allow them to mount a defense at this stage of the proceedings. *Conley v. Gibson*, 355 U. S. 41, 78 S. Ct. 99; Fed. Rules Civ. Pro. 8(a).

For those reasons, the Petitioner believes it was error to dismiss the Petitioners' complaint and that, in dismissing, the Court of Appeals failed to identify the standard used by it to judge the sufficiency of the complaint or applied an incorrect standard and that this practice and the resulting dismissal was such a departure from the usual course of Federal Judicial proceedings that supervision of this Court is warranted.

CONCLUSION

The petitioner urges that her application for writ of certiorari be granted.

Petitioner suggests that the complaint was sufficient to put the defendants on notice regarding the petitioners claims for damages and, in fact, alleged specifically several acts as violations of 20 U. S. C. § 1401 et seq. and companion regulations. e. g. Defendant's failure to evaluate Marla as required by the act; their failure to have a valid I. E. P. for Marla in existence at the time of making a substantial decision regarding a change in Marla's educational placement; refusal to readmit her to the class in which she was formerly enrolled even though ordered to do so by the Office of Civil Rights and the denial of a free and appropriate education to her. (Paragraph 18 of Complaint). That the I.E.P. prepared for her by the defendant failed to comport with the requirements of

federal law and that Marla was claiming relief based upon violations of her rights under 20-U. S. C. § 1401 et seq.; 42-U. S. C. § 1983; 29-U. S. C. 794 and the Due Process and Equal Protection clauses of the 14th amendment to the United States Constitution. (Paragraph 20 of complaint).

Petitioner further suggests that these acts of the defendants, if proved, would amount to violations of 20-U. S. C § 1415 and that the resulting misevaluation, misplacement and miseducation would deny Marla both participation in and the benefits of the defendants educational program in violation of 29-U. S. C. § 794 and would also deny Marla equal access to the defendants educational program in violation of her rights to equal protection guaranteed her by the United States Constitution and that the violation of 20-U. S. C. § 1415 would deny her Due Process as guaranteed her by the United States Constitution.

For all the reasons herein contained, the petitioner requests that this court declare that a private right of action for damages actionable under 42-U. S. C. § 1983 exists for violations of 20-U. S. C. § 1401 et seq. and that the District Court erred in dismissing the petitioners claims for damages; that the decision of the Circuit Court of Appeals be reversed and the action remanded to the District Court for trial on the merits on the issue of damages.

Respectfully submitted,

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